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THE JURISDICTION OF COURTS OVER FOREIGNERS.

II. PERSONAL JURISDICTION AT COMMON LAW.

IT has been shown in a former number of the Review [1] that the European notions of the jurisdiction of courts over persons are based on personal power over the party defendant through title to his personal obedience, rather than upon the power of the sovereign over the territory in which the person to be judged happens to be found. It was natural for Italy with its small city states and for Germany with its feudal principalities, often small or even of disconnected portions of territory, to lose sight of territorial power as the ultimate basis of jurisdiction, and to be more impressed with the reciprocal rights of the feudal sovereign and his subjects. Even France, though in time it became a politically compact country, with its natural ambition not in the acquisition of outlying fiefs but in the extension of its boundaries over adjoining territory, had nevertheless a law which continued to be feudal in nature. In France duchies and even small feudal fiefs each had their own law; and in origin these laws were grouped into two entirely distinct systems, that of northern France, which was Germanic, and that of southern France, which was Latin. If these nations therefore laid little stress on mere territorial sovereignty and relied

[1] 26 HARV. L. REV. 193.

chiefly on feudal allegiance as the basis of jurisdiction, it is what we might naturally expect. In England, on the other hand, the law of the king's courts, common to the whole territory of England, became the sole law of the land. The centralizing policy of the Plantagenets was completely effective in arousing the feeling of territorial nationality, and in bringing about the recognition of the king as a territorial rather than a feudal sovereign. It was natural, therefore, that territorial principles should lie at the basis of the jurisdiction of the king's courts. This natural feeling was emphasized by the historical development of the king's courts. Apart from real actions (including debt, which was real in origin) the king's jurisdiction was originally confined to trespass, which he brought within the jurisdiction of his own judges by alleging it to be an act in breach of his peace. Personal actions in the king's courts were therefore in their origin violations of public order; and even the most extreme advocates of the theory of personal jurisdiction admit that questions of public order are reserved solely for the jurisdiction of the territorial sovereign. This original jurisdiction in personal actions was extended by the Statute of Westminster II to cover all actions *in consimili casu*, and the whole modern law of personal actions is derived from this statute. With these political and historical reasons for its adoption we shall not be surprised to find the principle of territorial jurisdiction accepted in all states where the common law prevails.

Outside of its jurisdiction, the court's act is a mere nullity. The only difference between the judgment of a court and a similar order issued by an ordinary individual or association lies in the power of judicial action conferred on the court by the sovereign; for judicial power is one of the attributes of sovereignty, and can be conferred by a sovereign alone. But the sovereign can confer this power only so far as his jurisdiction extends. When a court attempts to act beyond its jurisdiction, its order no longer possesses this attribute; and it has no more legal effect, therefore, than the order of a private individual, that is, none at all.[2]

[2] "It is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding

The general rule of the common law, then, is that where a person is actually present within the territory of a certain sovereign he may upon proper service of process be subjected to the jurisdiction of the courts of that sovereign. And this is true although he is a non-resident and is merely temporarily present,[3] as for instance where he is traveling through the territory.[4] To this general rule of jurisdiction an exception appears to have been established. The courts have said that where the defendant has been decoyed into the state by fraud or brought by force, the state has no jurisdiction over him;[5] so one who is induced to come into the state on pretense of business, and is there served with process, is not bound by the judgment of the court,—unless indeed he has had a reasonable time to leave the state after the conclusion of the business, for if he lingers thereafter he is subject to service.[6] But though it is ordinarily said that in this case the courts of the state into which a party is inveigled by fraud have no jurisdiction over him, the truth is that there is no defect of jurisdiction, but the fraud of the judgment plaintiff is the basis of an equitable plea in bar of the judgment;[7] and this is proved by the fact that if the fraud is that of a third party, and does not personally charge the judgment plaintiff, the judgment is perfectly good in spite of the fact that the judgment defendant was fraudulently inveigled into

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such persons or property in any other tribunals.' Story, Conf. Laws, sect. 539." Field, J., in Pennoyer *v.* Neff, 95 U. S. 714 (1877).

Cf. the language of Griffith, C. J., in Permanent Building & Investment Association *v.* Hudson, 7 Queens. L. J. 23 (1896), 1 Beale, Cases on the Conflict of Laws, 364: "Writs in New South Wales run as far as the border of New South Wales, and no further. Beyond that they are mere pieces of paper — mere notices."

[3] Mason *v.* Connors, 129 Fed. 831 (1904); Lee *v.* Baird, 139 Ala. 526, 36 So. 720 (1903); Darrah *v.* Watson, 36 Ia. 116 (1872); Badger *v.* Towle, 48 Me. 20 (1860); Alley *v.* Caspari, 80 Me. 234, 14 Atl. 12 (1888); Thompson *v.* Cowell, 148 Mass. 552, 20 N. E. 170 (1889); McDonald *v.* MacArthur, 154 N. C. 122, 69 S. E. 832 (1910); Bowman *v.* Flint, 37 Tex. Civ. App. 28, 82 S. W. 1049 (1904).

[4] Peabody *v.* Hamilton, 106 Mass. 217 (1870).

[5] *Fraud:* Union Sugar Refinery *v.* Mathiesson, 2 Cliff. 304 (1864); Cavanagh *v.* Manhattan Trust Co., 133 Fed. 818 (1905); Duringer *v.* Moschino, 93 Ind. 495 (1883) (*semble*); Dunlap *v.* Cody, 31 Ia. 260 (1871); Toof *v.* Foley, 87 Ia. 8, 54 N. W. 59 (1893); Abercrombie *v.* Abercrombie, 64 Kan. 29, 67 Pac. 539 (1902); Copas *v.* Provision Co., 73 Mich. 541, 41 N. W. 690 (1889); Williams *v.* Reed, 29 N. J. L. 385.

Force: Ziporkes *v.* Chmelniker, 15 N. Y. St. Rep. 215 (1888) (*semble*).

[6] Jaster *v.* Currie, 198 U. S. 144, 148 (1905); Pilcher *v.* Graham, 18 Ohio C. C. 5 (1899).

[7] Jaster *v.* Currie, 198 U. S. 144 (1905).

the state.[8] It would seem, then, that in the case of fraud there is no real exception to the general principle that a foreigner personally found within the territory of a sovereign is subject to the jurisdiction of his courts.[9]

On the other hand, in cases where no special ground of jurisdiction exists, it is universally held that a foreigner cannot be subjected to the jurisdiction of a court if he is not actually found within the territory.[10] The leading case on this point is of enough interest to bear statement. It was an action in assumpsit on a foreign judgment of the island court of Tobago. The record of the judgment showed that upon the filing of the declaration the court ordered a summons to the defendant to appear, which was served by nailing up a copy of the declaration at the court-house door. The defendant had never been on the island nor did he appear by attorney. It was shown that this mode of summoning absentees was warranted by a law of the island and was actually practised there. The English court, however, refused to recognize the validity

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[8] Union Sugar Refinery *v.* Mathiesson, 2 Cliff. 304 (1864), and cases cited; *Ex parte* Taylor, 29 R. I. 129, 69 Atl. 553 (1908).

[9] The case of a foreign sovereign or his ambassador is of course an exception to the general principle; this exception will not be considered here. For cases bearing on this exception, see Scott's Cases on International Law, 182–186, 192–208.

[10] D'Arcy *v.* Ketchum, 11 How. (U. S.) 165, 13 L. ed., 648 (1850); Bischoff *v.* Wethered, 9 Wall. (U. S.) 812, 19 L. ed., 829 (1869); Dull *v.* Blackman, 169 U. S. 243 (1898); Osborn *v.* Lloyd, 1 Root (Conn.) 301 (1791); Wood *v.* Watkinson, 17 Conn. 500, 44 Am. Dec. 562 (1846); Reynolds, etc. Mortgage Co. *v.* Martin, 116 Ga. 495, 42 S. E. 796 (1902); Western Union Tel. Co. *v.* Pacific & Atlantic Tel. Co., 49 Ill. 90 (1868); Beard *v.* Beard, 21 Ind. 321 (1863); State *v.* Harvester Co., 81 Kan. 610, 106 Pac. 1053 (1910); McSherry *v.* McSherry, 113 Md. 395, 77 Atl. 653 (1910); Rand *v.* Hanson, 154 Mass. 87, 28 N. E. 6 (1891); Hildreth *v.* Thibodeau, 186 Mass. 83, 71 N. E. 111 (1904); McEwan *v.* Zimmer, 38 Mich. 765, 31 Am. Rep. 332 (1878); Booth *v.* Connecticut Mutual Life Ins. Co., 43 Mich. 299 (1880); Cocke *v.* Brewer, 68 Miss. 775, 9 So. 823 (1891); State *v.* Blair, 238 Mo. 132, 142 S. W. 326 (1911); Whittier *v.* Wendell, 7 N. H. 257 (1834); Schwinger *v.* Hickok, 53 N. Y. 280 (1873); Bullowa *v.* Provident Life & Trust Co., 125 N. Y. App. Div. 545 (1908); Davidson *v.* Sharpe, 6 Ired. L. (28 N. C.) 14 (1845); Scott *v.* Noble, 72 Pa. 115 (1872); Price *v.* Schaeffer, 161 Pa. 530, 29 Atl. 279 (1894); Martin *v.* Martin, 214 Pa. 389, 63 Atl. 1026 (1906); Frothingham *v.* Barnes, 9 R. I. 474 (1870); Miller *v.* Miller, 1 Bail. L. 242 (1829); Tillinghast *v.* Boston, etc. Co., 39 S. C. 484, 18 S. E. 120 (1893); Skinner *v.* McDaniel, 4 Vt. 418 (1832); Miller *v.* Sharp, 3 Rand. 41 (1824); Hopkirk *v.* Bridges, 4 Hen. & M. 413 (1808); Don *v.* Lippmann, 5 Cl. & F. 1, 21 (1837); Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870). See, however, Butterworth *v.* Kinsey, 14 Tex. 495 (1855), where suit was allowed against a non-resident not served with process.

of the judgment; and Lord Ellenborough said: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"[11] Since the jurisdiction of the court does not extend into the foreign country, and its writ is waste paper there, service of process, or what is service in form, on the foreigner in his own country is ineffective, and does not help the case.[12]

Examples of this principle may be of interest. A court which has jurisdiction to grant a divorce cannot join with its decree a personal judgment for alimony against a non-resident not served with process.[13] Where a German court issued a decree of bankruptcy against an absent defendant, it could not give a valid judgment for the unpaid balance of the debts.[14] When an action is brought to subject property within the state to the payment of a debt due from a non-resident, a personal judgment cannot be given for a balance unpaid;[15] and *a fortiori* if the suit as originally brought asked for and obtained a personal judgment against a non-resident, this judgment is of course void, and property within the state cannot be taken and applied to the payment of it.[16] A bill for an injunction or other personal suit in equity also requires personal jurisdiction, and cannot be maintained against a non-resident not served with process.[17] Since the defect of jurisdiction, as has been seen, is such that a decree rendered in the case is *coram*

[11] Buchanan *v.* Rucker, 9 East 192 (1808).

[12] Ewer *v.* Coffin, 1 Cush. (Mass.) 23, 48 Am. Dec. 587 (1848); Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870); Permanent Building & Investment Association *v.* Hudson, 7 Queens. L. J. 23 (1896). In the latter case the court says: "The document served on him was only a piece of paper to which, in my opinion, he was in no way bound to pay attention."

An exception must, however, be noted to this general statement where two states are under the political jurisdiction of a single sovereign; he may by legislation provide for a binding service of process in any state under his dominion. Thus by statute process from an English court may be legally served in the Isle of Man. Jackson *v.* Spittall, L. R. 5 C. P. 542 (1870); Vaughan *v.* Weldon, L. R. 10 C. P. 47 (1874).

[13] Beard *v.* Beard, 21 Ind. 321 (1864); Middleworth *v.* McDowell, 49 Ind. 386 (1875).

[14] Kuehling *v.* Leberman, 2 W. N. C. 616 (1875).

[15] Dearing *v.* Bank of Charleston, 5 Ga. 497, 48 Am. Dec. 300 (1883); Williams *v.* Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179 (1880); McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666 (1884); Arndt *v.* Arndt, 15 Oh. 33 (1846); Price *v.* Hickok, 39 Vt. 292 (1866).

[16] Pennoyer *v.* Neff, 95 U. S. 714; Bartlett *v.* Holmes, 12 Hun (N. Y.) 398 (1877).

[17] Warlick *v.* Reynolds, 151 N. C. 606, 66 S. E. 657 (1910); McKinne *v.* Augusta, 5 Rich. Eq. (S. C.) 55.

non judice, as if it had been rendered by a mere private person, the court cannot, by a finding of fact, make for itself a jurisdiction which does not really exist: its finding of fact has no judicial force.[18] In spite of the facts found by a court, therefore, the real fact as to absence of the defendant from the state may be shown in another court to invalidate the judgment.[19]

Before proceeding to discuss special grounds of jurisdiction over persons present, it will be well to consider how far this jurisdiction, if it exists, will be exercised by the common law. Three possible limitations have been urged.

(1) Opening the courts to foreigners. It has been seen that in France the courts are not open to foreigners. In cases governed by common law, however, the courts are in general freely open to all persons, as well in actions between foreigners as where one party is a citizen.[20] Even the special provisions by which poor persons are given favors, as, for instance, where they are allowed to sue *in forma pauperis*, are extended as freely to foreigners as to citizens of the state.[21] It is only in New York that any limitation has been seriously suggested, and there the limitation applies generally only in the case of foreign corporations.[22]

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[18] Knowles *v.* Logansport Gaslight & Coke Co., 19 Wall. (U. S.) 58, 22 L. ed. 70 (1874).

[19] Palmer *v.* De Witt, 47 N. Y. 532 (1871); Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638; s. c. 30 S. W. 494 (1893).

[20] Roberts *v.* Dunsmuir, 75 Cal. 203, 16 Pac. 782 (1888); Frank Simpson Fruit Co. *v.* Atchison, T. & S. F. Ry., 245 Ill. 596, 92 N. E. 524 [1910]; Levi *v.* Kaufman, 12 Ind. App. 347, 39 N. E. 1045 [1895]; Barrell *v.* Benjamin, 15 Mass. 354 [1819] (*semble*); Roberts *v.* Knights, 7 Allen (Mass.) 449 (1863); Johnston *v.* Trade Ins. Co., 132 Mass. 432 (1882); Cofrode *v.* Gartner, 79 Mich. 332, 44 N. W. 623 (1890); Miller *v.* Black, 2 Jones L. (47 N. C.) 341 (1855); Walters *v.* Breeder, 3 Jones L. (48 N. C.) 64 (1855); McDonald *v.* MacArthur Bros. Co., 154 N. C. 122, 69 S. E. 832 (1910); Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225 (1896); American Well Works *v.* De Aguayo, 53 S. W. 350 (Tex. Civ. App., 1899); Pullman Palace Car Co. *v.* Arents, 28 Tex. Civ. App. 71, 66 S. W. 329 (1902).

In a few states statutes have limited this principle. Thus by the faulty wording of an early statute in Kentucky it was held that while a non-resident might sue another non-resident or a citizen, he could not sue a resident alien. Lexington Mfg. Co. *v.* Dorr, 2 Litt. (Ky.) 256 (1822); Banks *v.* Fowler, 3 Litt. (Ky.) 332 (1823); Ormsby *v.* Lynch, Litt. Sel. Cas. (Ky.) 303 (1821).

And in Michigan one foreign corporation may not ordinarily sue another on a foreign contract. National Coal Co. *v.* Cincinnati G. C. C. & M. Co., 131 N. W. 580 (Mich., 1911).

[21] Lisenbee *v.* Holt, 1 Sneed (Tenn.) 42 (1853).

[22] No effort will be made here to examine and classify the New York cases. The

(2) Proceeding on a foreign cause of action. There was great difficulty in England, owing to the form of proceeding in the middle ages, in the way of opening the courts to a foreign cause of action. The jury on which the courts must rely for information of facts was originally, as is well known, summoned from the vicinage, in order to give information of facts known to them;[23] and since the writ would not run to summon a jury or witness from abroad it was theoretically impossible to prove foreign facts. As early as the year 1282 an offer was made to bring a foreign dispute before the English courts.[24]

"The Florentine and many other Italian merchants obtained and enjoyed very many franchises and privileges in this kingdom. And at this time there were two factions or parties in Florence, to wit, Guelphs and Gibelines. Of these the Guelphs eventually were victorious and expelled the Gibelines from the city; and they destroyed the house of a certain Hugh le Pape, a merchant domiciled in this kingdom. This Hugh prayed our Lord the King that the Italian merchant should make compensation to him for this. The King deputed for this purpose two judges, to take inquisition as above. The said foreign merchants having been brought together they took inquisition as above. And though before one of those justices it was adjudged that said merchants should satisfy said Hugh for the damages suffered by the destruction of his house, it was brought before our Lord the King by writ of certiorari, and error was found in these words: because it is not the custom of England that any one should answer in the Kingdom of England for any trespass committed abroad in time of war or otherwise. It is adjudged that the whole proceeding and judgment is annulled, etc."

For a similar reason there was at first thought to be an insuperable objection to a foreign corporation bringing suit in England, namely, that there was no way of proving the proper record of its incorporation. These difficulties disappeared as soon as evidence was pre-

most important decisions are the following: Gardner *v.* Thomas, 14 Johns. (N. Y.) 134 (1817) ; Otis *v.* Wakeman, 1 Hill (N. Y.) 604 (1841); Robinson *v.* Oceanic Steam Navigation Co., 112 N. Y. 315, 19 N. E. 625 (1889); Burdick *v.* Freeman, 120 N. Y. 420, 24 N. E. 949 (1890); Latourette *v.* Clarke, 45 Barb. (N. Y.) 327, 30 How. Pr. 242 (1865); Reed *v.* Chilson, 16 N. Y. Supp. 744 (1891); Hatfield *v.* Sisson, 28 Misc. 255, 59 N. Y. Supp. 73 (1899); Anglo-American Provision Co. *v.* Davis Provision Co., 50 N. Y. App. Div. 273, 63 N. Y. Supp. 987 (1900); Collard *v.* Beach, 93 N. Y. App. Div. 339, 87 N. Y. Supp. 884 (1904).

[23] Thayer, Preliminary Treatise on Evidence, 90 *et seq.*

[24] Abbrev. Placit. 201 (M. 9 & 10 Ed. I.).

sented to the jury by the testimony of witnesses, or by copies of documents. A foreign corporation was eventually allowed to sue upon proving its incorporation by means of a document.[25] But another difficulty lay in the way of the exercise by the English courts of jurisdiction to redress foreign wrongs. In its origin the jurisdiction of the king's courts in personal actions, as has already been noticed, was based upon the commission of a breach of the king's peace; and as this was a jurisdictional fact, the tort, including the breach of the peace, must be laid as occurring at some place within the kingdom. When the new action on the case came into existence the same form of allegation naturally continued.

The difficulty caused by the form of allegation in the pleadings was finally surmounted by a fiction: namely, by laying a fictitious venue at some place within the kingdom; and this fictitious allegation of venue was not allowed to be disputed. In the first reported case of action for a foreign tort the wrong was committed in the island of Minorca; and the venue was laid "at Minorca, to wit at London aforesaid in the Parish of St. Mary le Bow in the Ward of Cheap."[26] From this time it became possible to sue in England for a foreign tort or breach of contract. The right to sue upon a foreign cause of action was recognized earlier in this country than in England. In 1648 the General Court of the Colony of Massachusetts Bay allowed suit for a battery committed in England, "Because a personall action follows the person & from the person onely the cause of the action ariseth."[27] As a result of this principle it is generally true to-day that personal action may be brought in any place.[28]

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[25] Dutch West India Co. *v.* Van Moses, 1 Stra. 612 (1724); in error, Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532 (1728). In the latter report the reporter says that "upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there."

[26] Mostyn *v.* Fabrigas, Cowp. 161 (1774).

[27] 2 Mass. Colon. Rec. 255.

[28] *Foreign Contract:* Levi *v.* Kaufman, 12 Ind. App. 347, 39 N. E. 1045 (1895); Johnston *v.* Trade Ins. Co., 132 Mass. 432 (1882); Smith *v.* Crocker, 14 N. Y. App. Div. 245 (1897); American Well Works *v.* De Aguayo, 53 S. W. 350 (Tex. Civ. App. 1899).

Foreign Tort: Mitchell *v.* Harmony, 13 How. (U. S.) 115, 14 L. ed. 75 (1851); Roberts *v.* Dunsmuir, 75 Cal. 203, 16 Pac. 782 (1888); Fruit Co. *v.* Railroad Co., 245 Ill. 596, 92 N. E. 524 (1910); Bershears *v.* Distilling Co., 80 Kan. 194, 101 Pac.

These ordinary personal actions in which suit can be brought anywhere are the so-called transitory actions. A class of personal actions however, called local, are not allowed outside the place where the cause of action arose. The principal action of this class is an action for trespass on land. The doctrine is firmly established in England that no suit can be brought outside the state where the wrong occurred for any tort which might result in the setting up of title to land; because, as the court says, the court could not make a declaration of title to foreign land, and should therefore not award damages for the trespass.[29] This decision is followed in most of the states in this country,[30] although vigorous dissent from it has been expressed in Minnesota.[31]

It seems to the writer that reasons both of theory and of convenience are in accordance with the Minnesota decision. The action is one for damages. The judgment in it can by no possibility, as the English court appears to fear, result in affecting the title of the land, even as between the parties; since the injury alleged is only to the actual possession, and judgment for the plaintiffs, or even satisfaction of that judgment, could by no possibility, even if the land were within the jurisdiction, affect the title to it, even between the parties. If indeed title in the defendant

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1011 (1909); Watts *v.* Thomas, 2 Bibb (Ky.) 458 (1811); Mason *v.* Warner, 31 Mo. 508 (1862); Henry *v.* Sargent, 13 N. H. 321 (1843); Ackerson *v.* Erie R. Co., 31 N. J. L. 309 (1865); Lister *v.* Wright, 2 Hill (N. Y.) 320 (1842); Hatfield *v.* Sisson, 28 Misc. 255, 59 N. Y. Supp. 73 (1899); Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638, s. c. 30 S. W. 494 (1893); Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225 (1896); Pacific Co. *v.* Allen, 48 Tex. Civ. App. 66, 106 S. W. 441 (1907); Banco Minero *v.* Ross (Tex. Civ. App.), 138 S. W. 224 (1911).

[29] British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602. It is on this ground that the otherwise unaccountable decision of Matthaei *v.* Galitzin, L. R. 18 Eq. 340 (1874), must be rested. Dicey, Conflict of Laws, § 216.

[30] Eachus *v.* Trustees, 17 Ill. 534 (1856); Indiana, B. & W. Ry. *v.* Foster, 107 Ind. 430, 8 N. E. 264 (1886); De Breuil *v.* Pennsylvania Co., 130 Ind. 137, 29 N. E. 909 (1891); Allin *v.* Connecticut R. L. Co., 150 Mass. 560, 23 N. E. 581 (1890); Doherty *v.* Cement Co., 72 N. J. L. 315, 65 Atl. 508 (1905); Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703 (1888); Sentenis *v.* Ladew, 140 N. Y. 463, 35 N. E. 650 (1893); Niles *v.* Howe, 57 Vt. 388 (1885); Bettys *v.* Milwaukee & S. P. Ry., 37 Wis. 323 (1875).

In McGonigle *v.* Atchison, 33 Kan. 726, 7 Pac. 550 (1885), it was held that suit may be brought in Kansas for sand severed in Missouri and brought into Kansas; for trespass *quare clausum* may be waived and the action brought as a transitory action of trover.

[31] Little *v.* Chicago, S. P. M. & O. Ry., 65 Minn. 48, 67 N. W. 846 (1896). Followed in the United States court for the District of Minnesota: Peyton *v.* Desmond, 129 Fed. 1 (1904).

were set up by way of confession and avoidance and were denied by the plaintiff, and judgment proceeded upon that issue, the title as between the parties might be affected, but merely by way of *res judicata;* and if the land were foreign land the judgment would be ineffective even to this extent. The determination of the foreign title for the purposes of this suit would be merely the incidental determination of a fact such as the courts are every day compelled to make. On the other hand, if no redress is given it would always be possible for an ill-disposed person trespassing upon land, either by directing a destructive force upon the land from outside the jurisdiction, or by personally trespassing and leaving the jurisdiction, to do his harm with absolute impunity. This exception, therefore, grafted as it is on the sound general principle, seems unfortunate.

(3) The jurisdiction of a court of equity is, at common law, generally exercised only *in personam.* So far as jurisdiction in the international sense is concerned, the court may act upon any person whom it finds within the territory of its sovereign; but although in such cases there is international jurisdiction it does not necessarily follow that the court will exercise its jurisdiction. While equity has large powers to direct the conduct of parties it would seem clear that it should refrain from ordering actions to be done in a foreign country. If a court of equity, for instance, should order a man to do an act in another state, and when he went about to do it the act proved to be forbidden by the sovereign of that state, a condition of affairs would arise which the law could not contemplate with satisfaction. The defendant must either obey the court, act, and commit an offense against the territorial sovereign, or in obeying the law of the territorial sovereign must violate the decree. The unfortunate predicament of such a man is illustrated by the case of Langford *v.* Langford.[32] In that case the defendant had charged his Irish estates in favor of the plaintiff; but it was claimed that there were prior incumbrances. The Master of the Rolls got jurisdiction over the person of the defendant and ordered a receiver for the Irish estates; and the tenants were served with a notice to pay the rents to this receiver. The defendant, after giving his Irish solicitor notice of the order of the court,

[32] Langford *v.* Langford, 5 L. J. N. S. Ch. 60 (1835). See also *In re* Maudslay, [1900] 1 Ch. 602.

directed him to oppose the receiver's receiving the rents as far as the law would permit. The English receiver was unable to obtain payment of the rents; and it was assumed that under the Irish law the rents should have been paid to the defendant's agent, and not to the receiver. The court held that the defendant was in contempt; and thus stamped it as contempt of the English courts to direct his solicitor in Ireland to obey the law of Ireland. This is surely an unfortunate position for the English court of equity to take. It may be urged that the defendant should either have given no direction to his agent, or at least have directed him to permit the receiver to receive the rents so far as the law would permit. But this removes the difficulty only a step. To suffer the receiver to take the rents without interference would have enabled the English court to dispose of Irish property without securing a conveyance from the owner. The court might of course have required the defendant to execute a lease to the receiver; but the latter must then contend with the prior incumbrancers.

A better view is usually taken by the courts. According to the generally accepted doctrine a court of equity will order no act, even a ministerial act, to be done outside the territory over which the court has power;[33] nor will it do any act to interfere with the title to foreign land.[34] Of course a defendant within the control of the court may be enjoined from doing any act anywhere in the world, since he may obey the court without leaving the jurisdiction or in any way subjecting himself to the laws of other countries.[35]

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[33] So a court of equity may not order the abatement of a foreign nuisance: People *v.* Central R. Co., 42 N. Y. 283 (1870). Nor grant specific performance of a contract to dig a ditch in a foreign state. Port Royal R. Co. *v.* Hammond, 58 Ga. 523 (1877). Nor declare a deed of foreign land void. Carpenter *v.* Strange, 141 U. S. 87 (1891); State *v.* Grimm, 148 S. W. 868 (Mo., 1912); Davis *v.* Headley, 22 N. J. Eq. 115 (1871). But see Commonwealth *v.* Levy, 23 Gratt. (Va.) 21 (1873).

So a court cannot by mandamus compel the operation of a foreign railroad. People *et rel.* Van Dyke *v.* Colorado Central R. Co., 42 Fed. 638 (1890).

[34] Watkins *v.* Holman, 16 Pet. (U. S.) 25 (1842); Lynde *v.* Columbus, C. & I. C. Ry., 57 Fed. 993 (1893); White *v.* White, 7 Gill & J. (Md.) 208 (1835); Sutton *v.* Archer, 93 Miss. 603, 46 So. 705 (1908); Johnson *v.* Kimbro, 3 Head (Tenn.) 557 (1859); Gibson *v.* Burgess, 82 Va. 650 (1886). But see Dunlap *v.* Byers, 110 Mich. 109, 67 N. W. 1067 (1896); Wood *v.* Warner, 15 N. J. Eq. 81 (1862).

[35] Philadelphia Co. *v.* Stimson, 223 U. S. 605 (1912); Western Union Tel. Co. *v.* Pittsburg, C. C. & S. L. Ry., 137 Fed. 435 (1905); Alexander *v.* Tolleston Club, 110 Ill. 65 (1884); Burk *v.* Simonson, 104 Ind. 173, 2 N. E. 309 (1885), 3 N. E. 826 (1885); Frank *v.* Peyton, 82 Ky. 150 (1884); French *v.* Maguire, 55 How. Pr. (N. Y.) 471

But he cannot be called upon to do a positive act abroad. It is for this reason that while a court of equity will ordinarily decree the specific performance of a contract to convey foreign land, since the decree is simply that the defendant execute a deed of the land, which he may do within the territory of the court,[36] and may for the same reason compel him to account for the proceeds of foreign land,[37] a bill for a conveyance will not be entertained where the only method of conveying the foreign land is by the doing of some act within the territory where the land lies; as, for instance, if the title can be conveyed only by entry upon the local register.[38]

While these principles have been generally accepted by common-law courts a few late cases decided under somewhat aggravating circumstances appear to have departed from them, or at least to tend to a widening of the jurisdiction of equity.

The first of these cases were the Salton Sea Cases.[39] The facts, as stated in a previous number of this Review,[40] were as follows:

"The defendant constructed a canal conveying the waters of the Colorado River by means of an intake situated in Mexico. An accumulation of water resulted within the territory of Arizona which damaged the plaintiff's property situated therein."

An injunction was issued against diverting water from the river, except on certain conditions; among which were provisions regulat-

(1878); Gibson *v.* American Loan & Trust Co., 58 Hun (N. Y.) 443, 12 N. Y. Supp. 444 (1890). See Atlantic & Pacific Tel. Co. *v.* Baltimore & Ohio R. Co., 46 N. Y. Super. Ct. 377 (1880).

[36] Massie *v.* Watts, 6 Cranch (U. S.) 148 (1810); Guild *v.* Guild, 16 Ala. 121 (1849); Lamkin *v.* Lovell, 58 So. 258 (Ala., 1912); McGee *v.* Sweeney, 84 Cal. 100, 23 Pac. 1117 (1890); Cloud *v.* Greasley, 125 Ill. 313, 17 N. E. 826 (1888); Reed *v.* Reed, 75 Me. 264 (1883); Brown *v.* Desmond, 100 Mass. 267 (1868); Vreeland *v.* Vreeland, 49 N. J. Eq. 322, 24 Atl. 551 (1892); Gardner *v.* Ogden, 22 N. Y. 327 (1860); Joy *v.* Midland State Bank, 26 S. D. 244, 128 N. W. 147 (1910); Guerrant *v.* Fowler, 1 Hen. & M. 5 (1806); Poindexter *v.* Burwell, 82 Va. 507 (1886); Penn *v.* Lord Baltimore, 1 Ves. Sr. 444 (1750).

So a bill will lie against a mortgagee in trust to compel him to exercise his power of sale in foreign land. Mead *v.* N. Y. H. & N. R. Co., 45 Conn. 199 (1877); Eaton *v.* McCall, 86 Me. 346, 29 Atl. 1103 (1894); Union Trust Co. *v.* Olmsted, 102 N. Y. 729, 7 N. E. 822 (1886).

[37] Edwards *v.* Ballard, 14 La. Ann. 362 (1859).

[38] Waterhouse *v.* Stansfield, 10 Hare 254 (1852).

[39] 172 Fed. 792 (1909).

[40] 23 HARV. L. REV. 400; and see a criticism of the cases, *ibid.* 390. See this note for an excellent discussion of the questions here under discussion.

ing the flow. In order to obey the injunction it was clear that the defendant must change his gates in Mexico; but this was held no objection. The court said:

"Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court may act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

The case seems rightly decided on the facts; and it is no real extension of principle. The relief asked is an injunction; and, as has been seen, an injunction may always be granted against doing an act abroad. Here the act abroad injures land within the jurisdiction of the court, and the act is therefore tortious by our law. If in such a case the defendant has by his wrongful conduct put himself into a position where he cannot refrain from further tort, except by doing some act abroad, it is his own affair; the court merely enjoins the continuance of the tort.

The other case is similar. The defendants were, by works outside Nevada, wrongfully diverting water from a stream in Nevada. The plaintiff, who was injured by the diversion, brought suit for an injunction against the diversion. The defendant thereupon brought suit in California to quiet his title to the water; and the plaintiff then brought the present suit to enjoin the California suit. The Supreme Court upheld an injunction.[41] The relief prayed for was merely an injunction. Obedience to injunction in the original suit would, to be sure, have required alteration in works in California; but the same reasoning applies as in the Salton Sea Cases. The defendant has put himself in such a position that he must continue to commit a tort in Nevada or else do the act in the other state. These decisions appear to involve no clear violation of principle. But it must be confessed that the federal courts show a tendency to transcend state lines in the exercise of equity jurisdiction.

No excuse, however, can be found for an unwarranted departure from principle in a recent New Jersey case. The New Jersey

[41] Rickey L. & C. Co. *v.* Miller, 218 U. S. 258 (1910.)

court, being the court of the wife's domicile, on the ground of having jurisdiction for divorce, and as a step in a bill for divorce brought by the wife, enjoined the non-resident husband against procuring a divorce in North Dakota, and served the injunction by publication. On his disobedience, it ordered him to try to induce the North Dakota court to set aside the decree of divorce it had granted him.[42]

Returning now to the general exercise of personal jurisdiction, let us examine cases where special jurisdiction may be claimed over a person not actually within the territory.

(A) *Domicile.* It seems to be pretty clear that every person domiciled within a territory is subject, so long as this domicile continues, to the jurisdiction of his sovereign, and therefore is personally subject to the courts of the sovereign. This is recognized in the common practice of permitting service of process at the last and usual place of abode of a defendant. In the leading case a person domiciled in Scotland was absent in Australia, and according to the Scotch law was served with process by proclamation at the Market Cross of Edinburgh and at the pier and shore of Leith. It was held that by this process the Scotch court obtained complete personal jurisdiction over him.[43] This principle has been generally, though not universally, accepted in America.[44] If the sovereign of domicile has this power, it would seem *a fortiori* that the sovereign of allegiance would equally have such power; and it is believed that this is the case.

(B) *Cause of action arising within the territory.* There is a considerable body of authority to the effect that a defendant is personally subject to the jurisdiction of the courts of a state within which he committed a tort, or made or broke a contract. When carefully examined it would appear that all these suggestions are

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[42] Kempson *v.* Kempson, 63 N. J. Eq. 783 (1902). The lack of personal jurisdiction over the husband in the original proceeding will be noted. The opposite decision was reached in a California case: De la Montanya *v.* De la Montanya, 112 Cal. 101, 44 Pac. 345 (1896), where there was no difficulty of jurisdiction, because the absent spouse was still a citizen. See a learned note to the decision, 53 Am. St. Rep. 165.

[43] Douglas *v.* Forrest, 4 Bing. 686 (1828). *Acc.* Cowan *v.* Braidwood, 1 M. & G. 882 (1840).

[44] Glover *v.* Glover, 18 Ala. 367 (1850); Henderson *v.* Staniford, 105 Mass. 504 (1870); Hunt *v.* Hunt, 72 N. Y. 217 (1878); Frothingham *v.* Barnes, 9 R. I. 474 (1870) (*semble*). *Contra,* Smith *v.* Grady, 68 Wis. 215 (1887).

merely *dicta*. The question finally arose for actual decision in England in the interesting case of Sirdar Gurdyal Singh *v.* Rajah of Faridkote.[45] In that case the defendant had acted as treasurer of one of the independent Indian sovereigns. While acting as treasurer, it was claimed, he embezzled funds of the state. Having left the state, of which he was not a citizen, he had been sued *in absentem* in the native court, and judgment had been obtained against him. Suit was brought on this judgment in a colonial court, and on appeal the Judicial Committee of the Privy Council held that:

"No territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners who owe no allegiance or obedience to the power which so legislates."

(C) *Property within the jurisdiction.* It has been intimated, particularly in the earlier cases, that the mere presence of property of a defendant within the jurisdiction of the court gives the court power to issue a personal judgment against him;[46] the reason alleged being, that by placing his property within the care of the sovereign the defendant thereby has subjected himself to the courts of the sovereign. In most cases where this intimation is made the court probably meant no more than that the property was thereby subjected to the decree of the courts: a doctrine which will be examined in a later article. If more than that was intended by the intimations, they have been thoroughly discredited by later authority; and it may now be said without question that no one is personally subject to the jurisdiction of a court merely because he owns property within the territory of the court.[47]

(D) *Consent.* Consent is the principal ground of jurisdiction over an absent party, and it is in general a sufficient ground. Such consent must of course be actual. No inference or presumption contrary to actual fact, such as a presumption of law, or any fictitious rule of a particular law finding consent, if consent does not actually exist, can give a court power over a person not other-

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[45] [1894] A. C. 670.

[46] Penn *v.* Evans, 28 La. Ann. 576 (1876); Ewer *v.* Coffin, 1 Cush. (Mass.) 23, 48 Am. Dec. 587 (1848) (*semble*); Johnson *v.* Herbert, 45 Tex. 304 (1876).

[47] Pennoyer *v.* Neff, 95 U. S. 714 (1877); McVicker *v.* Beedy, 31 Me. 314, 50 Am. Dec. 666 (1850); and cases cited *ante*, note 15.

wise within its jurisdiction. In every case, therefore, it will be necessary to find actual consent to found jurisdiction.

The commonest instance of such consent is the voluntary appearance of the party. Thus if a defendant gets actual knowledge of the pendency of the suit against him and employs counsel to enter his appearance, he will be bound by the result of the suit;[48] *a fortiori*, if he enters a general demurrer, answer, or motion to dismiss on the merits.[49]

This is true even though his appearance was entered through a mistake of law as to his rights, or under the decree of a court which in fact had no power to make such a decree.[50] The appearance must of course be an appearance to litigate the subject matter. A mere special appearance by counsel to deny the jurisdiction is not a consent to the jurisdiction.[51]

Will "acceptance of service" of the writ, made outside the jurisdiction of the court, constitute consent to the jurisdiction? In one meagerly reported case it was held that it would.[52] In another case the court held otherwise, on the ground that such acceptance merely constituted acknowledgment of notice, and since the process was void this amounted to nothing.[53] It would seem that the case should not be determined by any technicality as to the nature of the process, but by an inquiry as to the actual intention with which the acceptance was made.

As the appearance of a defendant gives the court jurisdiction to enter a decree against him, so also the appearance of a plaintiff gives the court jurisdiction to pass not merely upon his own demand, but upon any cross demand of the defendant which may be con-

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[48] National Coal Co. *v.* Cincinnati G. C. C. & M. Co., 131 N. W. 580 (Mich., 1911); McCormick *v.* Pennsylvania Central R. Co., 49 N. Y. 303 (1872); Shumate *v.* Harbin, 35 S. C. 521, 15 S. E. 270 (1892); Banco Minero *v.* Ross, 138 S. W. 224 (1911).

[49] State *v.* District Court, 40 Mont. 359, 106 Pac. 1098 (1910) (motion for time to answer); Stone *v.* Union Pacific R. Co., 32 Utah 185, 89 Pac. 715 (1907) (demurrer and answer). In Georgia the filing of a bond to dissolve a garnishment does not amount to consent to the jurisdiction. Henry *v.* Lennox-Haldeman Co., 116 Ga. 9, 42 S. E. 383 (1902); Beasley *v.* Lennox-Haldeman Co., 116 Ga. 13, 42 S. E. 385 (1901).

[50] See Howell *v.* Gordon, 40 Ga. 302 (1869).

[51] Gray *v.* Hawes, 8 Cal. 562 (1857); German Bank *v.* American Fire Ins. Co., 83 Ia. 491, 50 N. W. 53 (1891); Wright *v.* Boynton, 37 N. H. 9 (1858).

[52] People's, etc. Association *v.* Mayfield, 42 S. C. 424, 20 S. E. 290 (1894).

[53] Scott *v.* Noble, 72 Pa. St. 115, 13 Am. Rep. 663 (1872).

sidered legitimately to form part of the same subject matter.[54] This principle has been carried to such an extent that a foreign sovereign who cannot under any circumstances be made a party against his will may nevertheless be subjected to any cross suit of the sort described as well as to incidental orders during the progress of the proceedings.[55]

If jurisdiction has once been obtained over a defendant, subsequent removal out of the territory will not deprive the court of the power already obtained.[56] If the defendant has become subject to the court, he continues so subject in all process arising out of the litigation, such as appeals, writs of error, and all subsequent proceedings in the suit.[57]

Consent to the jurisdiction in the first instance means consent to everything that legitimately arises out of the claim originally made. It is not, however, a consent to submit to the jurisdiction as to matters newly brought into the litigation subsequently to the consent given. For this reason no judgment can be given against an absent party which is not responsive to the declaration, or other statement of claim of which he has had notice.[58]

A curious case arose in Ohio. An Ohio defendant had appeared by counsel in Arkansas before the outbreak of the Civil War; and after the war broke out a judgment was rendered against him. The court held that this judgment was not binding. The court of the seceding state was not the body to whose jurisdiction he had consented; and the continued appearance of counsel did not bind him by a new consent, since counsel's authority to represent him was revoked by the war.[59]

Not only may the defendant consent to the jurisdiction by appearance after litigation has begun: he may also submit to the

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[54] Arkwright Mills *v.* Aultman & Taylor Machinery Co., 128 Fed. 195 (1904); Aldrich *v.* Blatchford, 175 Mass. 369, 56 N. E. 700 (1900).

[55] Prioleau *v.* United States, L. R. 2 Eq. 659 (1866).

[56] Carter *v.* Mutual Life Ins. Co., 10 Hawaii 559 (1895); Traders' Mutual Life Ins. Co. *v.* Humphrey, 207 Ill. 540, 69 N. E. 875 (1904).

[57] Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100 (1891). See also Weaver *v.* Boggs, 38 Md. 255 (1873). One who has entered into a recognizance in court, being already subject to the jurisdiction, is subject to the issuance of process upon the forfeited recognizance without further service. Elsasser *v.* Haines, 52 N. J. L. 10, 18 Atl. 1095 (1889).

[58] Shields *v.* Coleman, 157 U. S. 168 (1894).

[59] Pennywit *v.* Foote, 27 Oh. St. 600, 22 Am. Rep. 340 (1875).

jurisdiction in advance. Thus it is possible to agree that all matters arising out of a contract may be tried in a particular court.[60] This is the case where the defendant signs what is called a judgment note; that is, a note in which he expressly consents that an attorney may confess judgment in his name in any court.[61] Such consent, however, thus given in advance, must be exactly followed. So where the maker of a bond authorized "any attorney of any court of record in the State of New York or any other State" to confess judgment against him, it was held that a judgment confessed by the prothonotary of a Pennsylvania court did not bind him, though the law of Pennsylvania authorized that officer to confess judgment upon such instruments. He was not authorized by the exact language of the bond, and his act therefore did not bind the maker.[62]

The question of consent to the jurisdiction of a court arises with respect to provisions of law, or to clauses in the articles of agreement of an association, to the effect that any member of the association may be sued at the domicile of the association. It is to be remembered that here, as everywhere, no provision of law can extend jurisdiction over the party, but his own consent is necessary; and we must find this consent in fact, if he is to be held. If the provision submitting the members of the association to the jurisdiction of a particular court is contained in the articles of association, so that in asking to be a member of the association he must necessarily have accepted this among the other provisions of the articles, we may fairly say that he has consented to the jurisdiction of the court as the articles clearly provide. If, however, the provision is simply a provision of the general laws of the country in which the association has been created, it is more difficult, if not impossible, to find such actual consent. The party knows that he is agreeing to articles of association, and therefore does in fact assent to them, even though he may choose to remain in ignorance of their particular provisions. This, however, cannot be said of his mental attitude toward the general laws of the foreign state which has

[60] Mittenthal *v.* Mascagni, 183 Mass. 19, 66 N. E. 425 (1903).

[61] Snyder *v.* Critchfield, 44 Neb. 66, 62 N. W. 306 (1895); Teel *v.* Yost, 128 N. Y. 387, 28 N. E. 353 (1891).

[62] Grover & Baker Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287 (1890). *Acc.* First Nat. Bank *v.* Cunningham, 48 Fed. 510 (1891).

chartered the association. While in a technical or fictitious sense these laws may be said to be incorporated in the articles of association, this is not true in fact; and unless a member happens to know that membership in the association does, according to the law forming it, involve a submission to the jurisdiction of a particular court, it is hardly possible to find an express consent to such jurisdiction. The English courts seem to be correct, therefore, in distinguishing between an assent to jurisdiction contained in the articles of association and a fictitious assent required by the general law of the incorporating company.[63]

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[63] Vallee *v.* Dumergue, 4 Exch. 290 (1849); Bank of Australasia *v.* Harding, 9 C. B. 661 (1850); Bank of Australasia *v.* Nias, 16 Q. B. 717 (1851); Copin *v.* Adamson, L. R. 9 Ex. 345 (1874).